Nos. 76-777, 76-933, 76-934 and 76-935

In the Supreme Court of the United States

OCTOBER TERM, 1976

PEGGY J. CONNOR, ET AL., APPELLANTS

v.

CLIFF FINCH, GOVERNOR OF THE STATE OF MISSISSIPPI, ET AL.

CLIFF FINCH, GOVERNOR OF THE STATE OF MISSISSIPPI, ET AL., APPELLANTS

v.

PEGGY J. CONNOR, ET AL. AND UNITED STATES OF AMERICA

UNITED STATES OF AMERICA, APPELLANT

v.

CLIFF FINCH, GOVERNOR OF THE STATE OF MISSISSIPPI, ET AL.

PEGGY J. CONNOR, ET AL., APPELLANTS

v.

CLIFF FINCH, GOVERNOR OF THE STATE OF MISSISSIPPI, ET AL.

ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF MISSISSIPPI

REPLY BRIEF FOR THE UNITED STATES

DANIEL M. FRIEDMAN,
Acting Solicitor General,

J. STANLEY POTTINGER,
Assistant Attorney General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-777
PEGGY J. CONNOR, ET AL., APPELLANTS
v.
CLIFF FINCH, GOVERNOR OF THE STATE OF MISSISSIPPI, ET AL.

No. 76-933
CLIFF FINCH, GOVERNOR OF THE STATE OF MISSISSIPPI, ET AL., APPELLANTS
v.
PEGGY J. CONNOR, ET AL AND UNITED STATES OF AMERICA

No. 76-934
UNITED STATES OF AMERICA, APPELLANT
v.
CLIFF FINCH, GOVERNOR OF THE STATE OF MISSISSIPPI, ET AL.

No. 76-935
PEGGY J. CONNOR, ET AL., APPELLANTS
v.
CLIFF FINCH, GOVERNOR OF THE STATE OF MISSISSIPPI, ET AL.

ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF MISSISSIPPI

REPLY BRIEF FOR THE UNITED STATES

ARGUMENT

I. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION BY FORMULATING A REAPPORTIONMENT PLAN COMPOSED OF SINGLE MEMBER DISTRICTS

The appellant state parties (No. 76-933) contend that the district court abused its discretion in failing to carve out an exception to this Court's decisions favoring single member districts in court-ordered plans. They argue that the long-standing state policy of preserving the integrity of county boundaries constituted "particularly pressing features calling for multi-member districts" within the meaning of *Chapman* v. *Meier*, 420 U.S. 1, 19, and that the absence of findings by the district court that multi-member districts dilute or cancel black voting strength rendered unjustifiable the district court's departures from the state's policy. On the record in this case, these arguments are without merit.

In *Connor* v. *Waller*, 421 U.S. 656, 657, this Court reversed the district court's judgment approving the 1975 state enactments reapportioning the Mississippi legislature. This ruling, however, was without prejudice to the district court's authority "to entertain a proceeding to require the conduct of the 1975 elections pursuant to a court-ordered reapportionment plan that complies with this Court's decisions in *Mahan* v. *Howell*, 410 U.S. 315 (1973); *Connor* v. *Williams*, 404 U.S. 549 (1972); and *Chapman* v. *Meier*, 420 U.S. 1 (1975)."

In *Chapman* v. *Meier*, *supra*, the Court had held, in a reapportionment case not involving claims of racial or political discrimination, that "[t]he standards for evaluating the use of multimember districts * * * clearly differ depending on whether a federal court or a state legislature has initiated the use." 420 U.S. at 18. Citing its earlier holding in the instant litigation emphasizing a preference for single-member districts in court-ordered plans (*Connor* v. *Johnson*, 402 U.S. 690, 692, as reaffirmed in *Connor* v. *Williams*, *supra*, 404 U.S. at 551), the Court in *Chapman* unanimously held that "[a]bsent particularly pressing features calling for multi-member districts, a United States district court should refrain from imposing them upon a State." 420 U.S. at 19.

While the Court stated in *Chapman* that "there is special reason to follow the *Connor* rule favoring * * * [single-member] districting" where the State "always has employed single-member districts" (420 U.S. at 19), the fact that the Court specifically relied on its earlier decision in the present case (*Connor* v. *Johnson*, *supra*)—and designated the basic rule "the *Connor* rule"—shows that the basic rule applies in the present context and is, indeed, the law of this case established by this Court in an earlier stage of this litigation (as the district court has now, belatedly, recognized). Although the district court's 1975 temporary plan adopted after the remand in *Connor* v. *Waller*, *supra*, included multi-member districts, its final plan redistricts the Mississippi House and Senate into single-member districts. The district court made no findings of a "singular combination of unique factors" (*Mahan* v. *Howell*, *supra*, 410 U.S. at 333)[1] or of "a legitimate state interest supporting the abandonment of the general preference for single-member

---

[1] In *Mahan* v. *Howell*, *supra*, this Court held that a district court had not abused its discretion in temporarily establishing a multimember senatorial district for the Virginia Senate. The Court found that the district court was faced with a number of unusual circumstances (410 U.S. at 330-333): first, the state-enacted single-member plan unconstitutionally discriminated against military personnel in the area affected. Second, the state enactment contained significant population disparities among the single-member districts established. Third, precise survey data which would have permitted the district court to create single-member districts reflecting actual population distribution were lacking. Finally, the filing deadline for the next legislative elections was fast approaching.

districts in court-ordered plans which we recognized in *Connor* v. *Johnson.*" *Chapman* v. *Meier, supra,* 420 U.S. at 20.

Multi-member districts in legislative plans, even when not shown to minimize or cancel out voting strength of racial or political elements of the voting population (*Fortson* v. *Dorsey,* 379 U.S. 433, 439),[2] are subject to "practical inherent weaknesses" (*Chapman* v. *Meier, supra,* 420 U.S. at 15-16). Nevertheless, in state-initiated plans multi-member districting is unconstitutional only where it is shown that a racial or political group has been denied access to the political process equal to that of other groups, through the lessening or cancellation of its voting strength. *Chapman* v. *Meier, supra,* 420 U.S. at 17. In court-ordered plans, however, single-member districts are emphatically preferred even in the absence of racial or political discrimination. *Chapman* v. *Meier, supra.* As previously noted, this preference can be overcome only by compelling state interests or extraordinary circumstances of the kind present in *Mahan* v. *Howell, supra,* and no such findings were made in this case.

In any event, where, as in the present case, the record shows a long and appalling history of deliberate exclusion of blacks from the political process, and the intentional use of reapportionment to achieve that end (U.S. Brief App. A 13a-28a), and this discrimination is aggravated by multi-member districting, such districting has no place in a court-ordered plan whatever the state policy may be. This Court has so indicated in this very litigation. *Connor*

[2]Absent proof of such defects, the Court has upheld legislative plans utilizing multi-member districting. See, *e.g., Kilgarlin* v. *Hill,* 386 U.S. 120; *Burns* v. *Richardson,* 384 U.S. 73; *Fortson* v. *Dorsey, supra.* See *Reynolds* v. *Sims,* 377 U.S. 533, 577. Where dilution of minority voting strength has been proved however, the Court has held multi-member districts to be invalid. *White* v. *Regester,* 412 U.S. 755.

v. *Johnson, supra,* reaffirmed in *Connor* v. *Williams,* 404 U.S. at 551. Accord, *East Carroll Parish School Board* v. *Marshall,* 424 U.S. 636; *Wallace* v. *House,* 425 U.S. 947.[3] Thus, in this case, the state's policy favoring the use of multi-member districts could not be given weight and the district court correctly adhered to "the general preference for single member districts in court ordered plans." *Chapman* v. *Meier, supra,* 420 U.S. at 20; *Connor* v. *Johnson, supra*; *Connor* v. *Williams, supra.*

We do not contend, however, that even in the circumstances reflected here, a long standing state policy favoring the integrity of political subdivisions should be totally disregarded.[4] On the contrary, it should be accommodated

[3]In *Wallace* v. *House, supra,* this Court vacated, for consideration in light of *East Carroll Parish School Board* v. *Marshall, supra,* a court of appeals decision requiring the district court to adopt the reapportionment plan proposed by a city under which one of five city aldermen would have been elected at-large. 515 F. 2d 619 (C.A. 5). Aldermen had historically been elected at-large. 515 F. 2d at 632. The plaintiffs claimed that the plan diluted black voting strength. On remand, the court of appeals concluded that the district court had not abused its discretion in adopting an all single-member districting scheme. *Wallace* v. *House,* 538 F. 2d 1138 (C.A. 5).

[4]The state appellants err in contending that "[t]he intervenor [the United States Attorney General] believes multi-member districts are per se unconstitutional" (Brief 42-43 n. 33). That has never been the position of the United States, nor does the portion of the record cited support that contention. Government counsel (State Parties Supp. App. 100a) stated:

> Mr. Johnson:
>
> I believe that goes directly to the issue in this case concerning the effect of a multi-member district in a Black area compared to the effect of a single-member district. The position of the United States has been, and still [37] is, that multi-member districts dilute the Black vote.
>
> Judge Coleman:

to the extent consistent with the district court's duty to remedy the effects of past discrimination in voting and to avoid unnecessary dilution of minority voting strength, while complying with the one-person, one-vote requirement.

In this case, the district court has not ignored the state policy of adhering to county lines (III A. 96-99). It has accommodated that policy to the extent consistent with its duty to avoid the use of multi-member districts (III A. 99). Thus, in reapportioning the legislature, it was guided by the following principles (III A. 100-101):

> 1. If a county has more than enough population for the election of a Representative or Senator, then there shall be one complete district within that county, thus at least one Senator or Representative will be chosen solely by that county. In practical effect this will largely preserve the integrity of county boundaries and conform, to a degree, with the state policy on that subject, *Mahan* v. *Howell, supra.*
>
> 2. Except where two or more districts may properly be set up *within* the same county as authorized by Mississippi Constitution, Section 254, no county will be split into more than two segments.

The state parties also argue (Br. 33-34) that county lines must be preserved intact because when counties are

---

Has any court ever held that as a per se proposition?

Mr. Johnson:

Not as a per se proposition. Our position is based on the evidence presented to this Court last May and on the basis of that record and on the basis of the information the Department of Justice has filed with this Court evaluating the effect of multi-member districts in certain areas, and stating our specific reasons for objecting to the state's plan.

fractured, voters in the fraction of a county that is combined with a whole county to form a district suffer dilution of their vote because they can be outvoted by the voters from the county which is not divided. At the same time they acknowledge (Br. 35) that in a plan that does not fracture county boundaries, compliance with one-person, one-vote requirements necessitates use of multi-member districts in which counties are combined. The effect of such combinations on smaller counties that are joined to larger counties would thus seem to be the same as the effect of combining a whole county with a part of another county. Cf. *Mahan* v. *Howell, supra,* 410 U.S. at 323-324. Thus the fracturing of counties to achieve single-member districts is not substantially different in this respect than a multi-member plan.[5] But a single-member districting has other remedial advantages, including the elimination of past dilution of black voting strength, which warrant its use in this case.[6]

---

[5]The state proposed no multi-member plan for adoption by the district court other than the 1975 legislative plan it was barred from implementing by Section 5 of the Voting Rights Act, (see U.S. Br. 14-16) and readoption of the court's 1975 temporary plan (State Parties Supp. App. 93a-94a).

[6]In their brief (p. 14 n. 13) the state appellants also note that the Attorney General's objection to the 1975 legislative plan under Section 5 of the Voting Rights Act, 42 U.S.C. 1973c, was interposed the day after its submission to the Attorney General. They overlook the fact that the United States participated as *amicus curiae* in the appeal from the district court's approval of that plan, *Connor* v. *Waller,* 421 U.S. 656, and, as a result, had already completed an extensive analysis of that plan (see Brief for the United States in No. A-968, October Term, 1974, Appendix B). As stated in the Attorney General's letter, the objection was based, in part, upon that analysis (see Br. for private appellants Connor, *et al.*, 15 n. 21).

II. SPECIAL ELECTIONS ARE REQUIRED TO REMEDY, WITHOUT FURTHER DELAY, DILUTION EXISTING UNDER PRIOR PLANS

We have shown in our main brief (pp.59-66) that the 1975 temporary plan (and prior apportionment plans) operated to dilute black voting strength in Mississippi by barring black participation in "the political process in a reliable and meaningful manner." *White* v. *Regester*, 412 U.S. 755, 767. As a part of the court's equitable remedy, special elections are required to end without further delay the effects of the state's policy of electoral discrimination against blacks.

The district court ordered special elections in two House districts—Nos. 79 and 97 (III A. 227, 228)—on the basis that such elections were "required to remedy any impermissible dilution of black voting strength in the temporary plan when compared with the permanent plan established for the 1979 elections" (III A. 224). Although we have argued that the district court misapplied this standard and that special elections are required in 13 additional districts (Br. 92-103), we agree with the court that prior "impermissible dilution" provides the basis for ordering special elections.

There is no substance to the state parties' contention that the standard enunciated by the district court is erroneous because it is "the standard of dilution applicable to cases cognizable under Section 5 of the Voting Rights Act of 1965 * * *" (Br. 50) and because the court did not explicitly find "any unconstitutional racial dilution" (*id.* at 48). Immediately following its formulation of the above standard, the district court cites as support three cases decided by the Court of Appeals for the Fifth Circuit[7] and

[7] *McGill* v. *Gadsden County Commission*, 535 F. 2d 277; *Paige* v. *Gray*, 538 F. 2d 1108; *Zimmer* v. *McKeithen*, 485 F. 2d 1297, affirmed on other grounds *sub nom. East Carroll Parish School Board* v. *Marshall*, 424 U.S. 636.

one case decided by the Court of Appeals for the Eighth Circuit[8] (III A. 224-225), none of which is based on Section 5. Nothing in the district court's opinion indicates that it was formulating its remedy to meet the requirements of Section 5. Rather, that remedy reflects the equitable principle that in districts in which discriminatory dilution existing under prior plans is being remedied in the court's final plan, special elections should be ordered where, as here, they will materially hasten implementation of a proper remedy for discriminatory denial of voting rights.[9]

CONCLUSION

For the reasons stated in the United States' main brief and this reply brief the judgment of the district court should be affirmed in part, reversed in part, and vacated in part. The cause should be remanded to the district court for implementation of the districting plans specified in our main brief for Hinds, Jefferson and Claiborne Counties in the Senate, and Warren, Forrest, Washington and Issaquena Counties in the House, or of other districting for those counties that does not dilute black voting strength. The district court should also be instructed to order special elections, to occur this year, in the new districts drawn in those counties to avoid dilution, in House Districts 3, 8, 16, 22, 24, 25, 47, 52, 79, 81, 89 and 97 and in Senate Districts 15, 16 and 28,

[8] *Dove* v. *Moore*, 539 F. 2d 1152.

[9] The United States agrees with the contention of the private appellants (Connor Br. 70-75) that Section 402 of the 1975 Amendments to the Voting Rights Act of 1965, 89 Stat. 404, 42 U.S.C. (Supp. V) 1973l(e), and the recently enacted Civil Rights Attorney's Fees Award's Act of 1976, Pub. L. 94-559, 90 Stat. 2641, warrant the award of reasonable attorneys' fees to counsel for the private plaintiffs in this case. In light of those statutes, there is no reason for this Court to consider the good faith *vel non* of the state. Cf. *Newman* v. *Piggie Park Enterprises, Inc.*, 390 U.S. 400.

as well as in such additional districts as are required because of their relationship to the foregoing districts.

Respectfully submitted.

DANIEL M. FRIEDMAN,
Acting Solicitor General.

J. STANLEY POTTINGER,
Assistant Attorney General.

FEBRUARY 1977.